No. 89-1083

IN THE

Supreme Court of the United States

October Term, 1989

J.I. HASS CO., INC.,

Petitioner,

against

GILBANE BUILDING COMPANY,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Questions Presented for Review

1. In absence of a clear, erroneous error of law and, in fact, no legal precept shown to be in error, was it not error for the Court of Appeals to deprive the Petitioner of its Bill of Rights under the Seventh Amendment of the Constitution, by an attempt to substitute and apply its interpretation of the facts, for the findings and determination of the jury?

2. Can the Court of Appeals assume the power to interpret and make a re-examination of facts on the basis that the United States District Court by denying the notion of the unsuccessful party for a judgment N.O.V. and for a new trial, *ipso facto,* raised a legal precept which entitles it to a plenary review, without referring to the legal precept; and further does that empower the Court of Appeals to go beyond interpreting the law and either construing, interpreting and making conclusions of facts which, in many essential areas, are contradictory to uncontested testimony, facts or positions as appears in the entire record?

3. If there is no error shown to exist in the United States District Court's legal pronouncements, as contained in the Charge or Instructions to the jury, can the Court of Appeals, based on its limited knowledge of the whole record, disagree with the jury's application of the law to the facts, deprive the successful party of its Constitutional right to trial by jury?

4. Was the Court of Appeals correct in applying the principle of the *parol evidence rule* to eliminate the testimony in the record concerning past history of similar working relationships and all other circumstances which would give meaning to the intent of the parties?

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5. Did the Court of Appeals commit error contrary to the laws of other jurisdictions in failing to recognize that the original contract and the second contract which they formed as a Change Order, were not to be considered together and perform the duty of the courts to harmonize the answers to specific interrogatories submitted to jury and "attempt to reconcile the jury's findings by exegesis if necessary . . ." before disregarding jury's special verdict and remanding case, as provided in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 9 L.Ed. 2d 618, 627 (963).

Parties Below

All parties below are parties to this Petition. An *amicus curiae* brief was filed by the Building Contractors Association of New Jersey, at the request of Gilbane and a copy of this Petition will be served upon their attorneys.

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The petitioner, J.I. Hass Co., Inc., pray that a writ of *certiorari,* issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled proceeding on August 8, 1989 and on the denial of the Petitioner for Rehearing *en banc,* entered on October 18, 1989.

Opinions Below

The written opinion of the United States Court of Appeals for the Third Circuit is reproduced as Appendix E.

The Order of the United States Court of Appeals for the Third Circuit denying the petition for an *en banc rehearing* dated October 18, 1989, as reproduced as Appendix F.

Jurisdiction

This case was tried before the United States District Court for the District of New Jersey, the Honorable John W. Bissell presiding, (under a complaint filed pursuant to 28 U.S.C. §1291 (1982)), for a period of approximately three and one-half months of extensive testimony, and the jury returned its verdict on February 25, 1988 in the amount of $1,461,872.73. It results from the sum of $2,150,628.87 which represented the actual costs incurred by the plaintiff, J.I. Hass Co., Inc., plus overhead and profit, as being the reasonable value of all the work done on the project, less a credit of $688,256.00 which was paid on account. From this was deducted an allowance of $63,000.00 for touch-up, $1,563.00 for undone work and $177,688.00 as a deduction of a 10% profit credit on the award to plaintiff. (App. 159-161.) The Court reduced the award by $31,000.00 so that the final amount of the damages award was $1,188,621.63. The Court added to this prejudgment interest of $291,908.00, based only on the admitted balance of $431,130.00 and, therefore, entered judgment on May 25, 1988 *nunc pro tunc* as of February 25, 1988 in the total sum of $1,480,529.63. (See Appendix "B" attached.)

Notices of Appeal were filed by Gilbane Building Company as to the merits of the case, and by J.I. Hass Co., Inc. only as to the issue of interest, pursuant to 28 U.S.C. §1291 (1982). (See Appendix "C" and "D" attached.)

The defendant-appellee/cross-appellant had filed a Notice of Motion for judgment N.O.V./or new trial and/or remittitur which, except for reduction of the amount of the judgment in the sum of $31,000.00, was denied by Order dated March 14, 1988. (See Appendix "A" attached.)

This matter on appeal was argued before the Honorable Judges A. Leon Higginbotham, Walter K. Stapleton and Robert E. Cowen on February 28, 1989 and their Opinion was rendered and filed on August 8, 1989. (See Opinion attached as Appendix "E".)

Under said decision, the Court, vacated the judgment of the District Court as to the First Count of the Complaint and ordered a remand of the same for a new trial consistent with the Opinion.

Plaintiff-appellant/cross-appellee filed a Petition for Rehearing *In Banc* under *Fed. R. App.*, P35(b) and 40(a) and the Court of Appeals for the Third Circuit entered its Order of denial on October 18, 1989. (See Appendix "F" attached.)

The jurisdiction of this Court to review the Order of the United States Court of Appeals for the Third Circuit is invoked under 29 U.S.C. §1254(1) (1988).

Statement of the Case

Gilbane Building Company of Rhode Island ("Gilbane") was a prime contractor of Miller Brewing Company

("Miller") for the erection of a beer brewing facility in Trenton, Ohio. J.I. Hass Co., Inc. ("Hass") was a painting contractor who was invited, as one of several others, by Gilbane to submit a proposal to them for buildings known as the Glass Warehouse Building, Brewhouse, Power House and Office Building. Said bid was submitted on November 14, 1980 for a sum of money which was, by negotiations agreed upon, in the amount of $295,000.00. Although the Room Finish and Color Schedule referred to the Glass Warehouse for said bid, this area was a part of the Packaging and Warehouse Building, referred to in said schedule and which was to be let out at a later date. Many of the drawings as to these buildings contained references to plumbing, electrical, fire protection, HVAC and duct work, which the Court of Appeals referred to as "mechanical systems". In a letter from Hass to Gilbane dated November 17, 1980, it was stated that "all equipment, including tanks, silos and their concerning work, mechanical, electrical and HVAC work excluded". Only piping and ducts within a specified closeness to the ceiling or walls to be painted. Also, Schedule "B", referring to this Contract, provided for the exclusion of such work, which was carried through to the so-called Change Order No. 1, as an amendment to the originally intended Contract.

The intended Contract for this scope of work, in the sum of $295,000.00, was set forth in a subcontract form dated March 24, 1981 prepared by Gilbane.

Under date of March 31, 1981, the work for additional buildings consisting of the Packaging and Warehouse area, Aging, Fermenting and Cold Service, and the Rail Shed and Grain Drying was let out by a formal invitation to bid and not as a Request for a Change Order, pursuant to the original intended "subcontract", to various paint-

ing subcontractors and the proposal of Hass which was required to and, in fact, submitted by 4:00 P.M. on April 15, 1981. The bid was based upon the drawings as to the Packaging and Warehouse buildings (which constituted 65% to 70% of the combined contracts) that were available and received by Hass prior to April 15, 1981. The only Color and Room Finish Schedule drawing pertained to architectural and structural work and not mechanical. The communication between Hass and Gilbane was that it would only be architectural and structural. A letter of intent to award the painting work to Hass was issued on May 26, 1981 for the total sum of $753,000.00.

The testimony is undisputed that the execution of the intended original subcontract dated March 24, 1981 and the submission of the proposal of April 15, 1981 which, after awarding this work to Hass, Gilbane elected to classify as Change Order No. 1 and dated June 1, 1981, were both prepared by Gilbane and executed at the same time and place on August 18, 1981. The testimony of William Kearny, a Vice President of Gilbane, was to the effect that the "Base Contract" dated March 24, 1981 and the Change Order #1, were not effective until the signing on August 18, 1981 as integrated contracts. As of that date, a considerable portion of work had already been performed.

At the time of the submission of the proposal on April 15, 1981, it was admitted in defendant's answers to Interrogatories, as well as by an abundance of testimony, direct or on cross from both sides, that the Packaging and Warehousing Room Finish Schedule did not contain Revisions 2 and 3 and, therefore, did not make any mention whatsoever of building and process piping or equipment package or mechanical work and, therefore, was not and could not have been included in Hass' proposal.

Additionally, there is a great abundance of testimony from both sides that the process piping and equipment package was to be and, in fact was at a later date let out by Miller on a separate bid on a contract to be made on a direct basis by Miller to a painting contractor under Construction Package 364 (App. at 3414), (as was the practice on prior job sites where Miller, Gilbane and Hass were involved), in accordance with Specification 9J (App. 3362).[1] On the basis of "fast tracking", drawings were made from time to time which would include not only "architectural and structural" work but all other work that was let out to other painting subcontractors, other trades and for the process piping and equipment package as referred to above. Thus, the credible testimony as to the drawings referred to by the Court of Appeals in its opinion, was as to work which the jury in its determination could and must have found that such work could not and was not included in Hass' scope of work.

Hass had performed a considerable amount of work on the building of the original intended contract and under C.O. #1, and the first time that Hass was requested to perform work, which they considered to be out of their scope, protests were made and the only work which was done, as it related to other than architectual and structural, was pursuant to a protest. On the cold service area, which the Court said was a part of the June 1, 1981 C.O. #1, the Project Manager of Gilbane, in a letter to Hass, referred to the catwalks above the fermenting tanks and to Change Order which would be forthcoming and stated that Gilbane appreciated Hass' cooperation in proceeding with this work (App. 3547), which was responded to by Hass by stating that the said work was not within their

[1]See Exh. P36, App. 3514-3517 in invitation of Miller as to Mechanical Equipment and Piping. "It also includes the painting of supports, piping, duct work, ladders, catwalks, rails, platforms . . . which might be furnished with the Equipment."

scope of work and that they were proceeding on the basis of a promise of a Change Order, to cooperate to perform the work on the sprinklers and cold storage areas so that the job would not be held up (App. 3548). The president of Gilbane, by letter in evidence, induced Hass to proceed with all work including work done under protest (Transcript Exh. P60, P61, P63, P64, App. 3514-3577), on the promise of making an adjustment. There is also testimony that Gilbane, in turn, passed on these protests to Miller as a claim beyond the scope of its and Hass'[2] work.

The claim of Hass is founded upon seven different Counts—the First is based upon there being no contract concluded by reason of no meeting of the minds and for recovery on *quantum meruit*. The Second is based upon the endless proof of lack of coordination, interferences, etc., chargeable to Gilbane, so Hass could not perform work in sequence and economically, causing damages to the plaintiff to such a degree that it vitiated any Contract and, therefore, recovery should be on *quantum meruit*. The Third Count is based upon reformation by either mutual or unilateral mistake and unconscionable and unjust harm and damage to the plaintiff. The Fourth Count is in the alternative, seeking recovery of the balance due under the putative Contract and Change Order in the sum of $431,130.00, which is undisputed. The Fifth Count was for recovery of the extras of $144,682.00, which seems to be the only matter that is placed in issue in the Opinion of the Court, and the Sixth Count, which is the largest part of Hass' claim, was for the myriad of interferences, lack of coordination and other failures of performance by Gilbane, causing damages to Hass which, in this case, was

[2]See letter of David A. Ricke, project engineer for Gilbane, to Miller which stated, contrary to the finding of the Court (Pg. 12) that Gilbane was proceeding to "paint" the sprinkler lines in Package and Warehouse under protest and would do no further work on this category. (App. 3529.)

calculated on a total cost method. The Seventh Count was for punitive damages, which was dismissed by the trial Court.

The trial Court below allowed interest only on the balance of the Contract of $431,130.00 in the sum of $291,908.00, which was disputed by plaintiff-appellant/cross-appellee as being insufficient.

These, of course, are not the full facts, pursuant to the testimony of three and one-half months, consisting of over 4,000 pages and some hundreds of exhibits. However, the Statement of Facts will only support some of the main issues being presented for this Petition.

REASON FOR GRANTING THE WRIT.

POINT I.

The petitioner has been deprived of its right to trial by jury.

At this 200th anniversary of the Bill of Rights, the Constitutional right of a jury trial should be re-affirmed so that the courts do not in practice deprive a litigant of its right to a jury trial.

The Seventh Amendment of the United States Constitution provides,

> "In suits of common law where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States then according to the rules of the common law". U.S.C.A. Amendment VII—Civil Trials.

After three months of trial before a conscientious jury, directed by a competent Judge, which resulted in a transcript in excess of 4,000 pages and over 350 exhibits, the Court of Appeals not only attempted a construction of facts, the weighing of credibility, disregarded the facts and testimony from which the jury relied upon but in some most essential elements of building its opinion, rewrote the script, as is summarized herein and, as a consequence, did deprive the plaintiff of its $1,480,529.63 damages sustained.

The principles of the amendment and the case law supporting this right is fundamental that the right is to be preserved to the successful party in the trial of the issue and that neither the Supreme Court nor the Court of Appeals can re-determine the facts as found by the jury. See *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited,* Pa. 1962, 82 S.Ct. 780, 369 U.S. 355, 71 L.Ed. 2d 798, 807, rehearing denied, which stated that "For the search for one possible view which will make the jury's finding inconsistent, results in a collision with the Seventh Amendment."

In the case of *Lame v. United States Department of Justice,* 767 F.2d 66, 69 (3rd Cir. 1985), the Court stated:

> ". . . when we are dealing with facts, our function is not to retry issues of fact *de novo* or substitute our judgment with respect to such issues for that of the trier of facts. We are called upon to simply determine whether, as a matter of law, the permissible findings sustained the judgment. As to those factual findings of the district court, we are governed by a clearly erroneous rule of review. Fed. R. Civ. P. 52(a) and that refers only if the findings are unsupported by substantial evidence, lack adequate evidential support in the record, are against

> the clear weight of evidence and where the District Court has mis-apprehended the weight of its evidence".

The determination as to whether there was a meeting of the minds, under the circumstances of this case, as will be detailed in the next Point, is not a legal issue but was dependent upon the interpretation of the facts presented by both parties. It is almost elementary to state that if there was no meeting of the minds, there was no legal contract for the Court of Appeals to exercise a plenary review as an issue of law.

For the proposition that the Court of Appeals will not substitute its judgment for that of the verdict and usurp the jury's function as per findings of fact, see *Collins v. Signetics Corp.*, 605 F.2d 110, 115 (3rd Cir. 1979). The Court rejected the appellant's contention that the evidence was insufficient to sustain the jury verdict. See also *Leeper v. United States*, 756 F.2d 300, 308 (3rd Cir. 1985). In the case of *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1099 (3rd Cir. 1980), the Court stated:

> "A jury verdict carries with it the benefit of all reasonable inferences capable of being drawn therefrom and an appellate court is bound to interpret the evidence in the light most favorable to the verdict winner . . . Any fact that the jury could have reasonably inferred from the evidence in favor of the verdict winner will be presumed to have been so inferred when the court reviews the record supporting the verdict . . .".

See also *Green v. U.S.X. Corp.*, 843 F.2d 1511, 1535 (3rd Cir. 1988).

The Court of Appeals in the case of *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3rd Cir. 1980) in dealing with an appeal from a denial of motion for a directed verdict or for a judgment notwithstanding the verdict, stated that the role of the Court in reviewing the record was a limited one and that the function of the Appellate Court was:

> "To review the record in this case in the light most favorable to the non-moving party . . . and to affirm the judgment of the district court denying the motion unless the record is critically deficient of the minimum quantum of evidence from which a jury might reasonably afford relief".

The jury below, after a review of all the facts based upon the testimony and documentary evidence, came to the conclusion, as appears in the Jury Question/Verdict form, that the plaintiff had proven that there was no contract between plaintiff, Hass, and defendant, Gilbane. (A159.) This was in accordance with the charge made to the jury and, in particular, the charge as to the meeting of minds of the parties. (A121 to A148.)

See also the following cases: *Parsons v. Bedford,* Pa. 1830, 28 U.S. 433, 3 Pet. 433, 7 L.Ed. 732. See also *Dawson v. Chrysler Corp.*, C.A. N.J. 1980, 630 Fed. 950, certiorari denied, 101 S.Ct. 1418, 450 U.S. 959, 67 L.Ed. 383; *Smith v. Illinois Cent. R. Co.*, C.A. Tenn. 1968, 394 F.2d 254; *Liberty Mutual Ins. v. Thompson,* C.A. Tex. 1949, 171 F.2d 723, which stand for the proposition that the United States Court of Appeals has no jurisdiction to re-examine facts tried by the jury, nor does the Court of Appeals have the authority to modify the verdict of the jury which passed on the issues of fact. *Hartnett v. Brown & Brigham,* C.A. Wyo. 1968, 394 F.2d 438.

Although the Court of Appeals cited cases as to the limitations or prohibitions of the review of the decision reached by a jury, it then, having said the words, turns away and disregards the jury's deliberative process by the justification that the district court's denial of the motion for a new trial was based on its application of a legal precept, granted it an unfettered license to review this deliberative constitutional process in a plenary and *de novo* manner. It cites *Honeywell v. American Standards Testing Bureau,* 851 F.2d 652, 655 (3rd Cir. 1988), cert. denied, 109 S.Ct. 795 (1989). This cited case involved the consideration of a legal precept of law as to the nature and character of proof needed to establish the claim. The Court of Appeals in the case *sub judice* does not define what legal precept was applied, erroneously or otherwise, by the trial Court. The Court of Appeals, in its approach, would tear down the fabric of the Bill of Rights' guarantee in its seizure of the fact deliberative powers of the jury for its plenary review by saying that, if the District Court denied the Motion for a new trial or for judgment N.O.V., that it is a legal application and the Court of Appeals could not only review whether the law as applied was erroneous but had the right to deal with the factual issues.

Compare this to the argument of *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 319 (3rd Cir. 1986). Nowhere does the Court of Appeals point out that the charge to the jury was "clearly erroneous" or contrary to law. (See A121 and A158.)

A partial listing of the issue oriented items indulged in by the Court of Appeals (which we seriously argue, went beyond the authority of that Court), and which not only disregarded the genuine issues of material fact, but adopted a series of findings that are contradicted and un-

disputed, so that judgment could not properly be entered, by a reversal in favor of Respondent, as a matter of law.

1. The Court of Appeals constructed its thesis of a case that involved a contract or one that was intended, and the emergence of change orders to that intended contract, as argued by defendant and the *Amicus Curiae* Brief (obviously written on behalf of an association without reading the 4,000 pages of transcripts and over 350 exhibits). This was contrary to accepted practices and more important to the undisputed fact of this case.

The Court refers to a subcontract dated March 24, 1981 for $295,000.00 in a manner that would give the impression it was executed on that date, and then concludes that, pursuant to Section 7(b) which provides for change orders, resulted in the proposal of Hass, by bid submitted on April 15, 1981, negotiated to $753,000.00. The argument is that Hass' proposal was conceived by the terms of the originally intended contract and was an adjunct or part thereof. This is not so. The first response to this conclusion is that the original intended contract for painting awarded to Hass was for four main buildings. Change orders in the construction industry are a device by which the contractor can, usually at request of owner, require the subcontractor to do extra work within the format and character of the scope of work contemplated by contract. It certainly would not apply to the painting of some five different buildings, at a price more than twice the amount of the base contract. See *Guinon v. United States,* 69 F.Supp. 341 (Ct. of Claims, 1947) and *United States v. Merritt-Chapman & Scott Corporation,* 305 F.2d 121 (3d Cir. 1962).

In any event, the Court of Appeals was in gross error in reaching such a finding for the real and uncontradicted

facts were that the work, which became to be known as Change order 1, was awarded pursuant to a separate invitation to bid dated March 31, 1981 (App. 3497) that was submitted to some three, four or more painting subcontractors for bids. The proposals were submitted, as required, by April 15, 1981. Only because Hass was the successful bidder, did it receive the award.

If some one else was the successful bidder, separate subcontract would have been entered into with that subcontractor, as was the case where other painting subcontractors were performing work in the very same buildings where Hass was painting.

There can be no dispute to this—it was known by the District Court Judge and the jury and it is an indication of the Court of Appeals' misunderstanding of the facts, very probably resulting from the thrust of the *Amicus Curiae* Brief, that this case concerned only some change orders arising from a basic contract or subcontract. The work wound up as a Change Order prepared by Gilbane for its convenience, of an attempt to incorporate the terms of the purported contract.

2. Another very fundamental error by the Court of Appeals, which deprived the Petitioner of its right to a jury trial, was the failure to understand or acknowledge a very important link to finding or conclusion of a contract in the construction industry.

The Court in considering the claim of extras for work done under protest, relies for its authority of required work by undefined references in the Color and Room Finish Schedule, which is only a small part of the drawings. It stated that "Moreover, we find the Room Finish Schedule for the Package and Warehouse Building clearly

prescribed under the subheading of 'Process and Building Piping' ", that Hass "paint exposed non-insulated ferrous metal, App. at 4114, which undoubtedly includes sprinkler pipes". A simple response is "so what", you can't paint anything that's not already built, or bid for work that's not depicted on drawings.

A proper application of the principle of law, as enumerated by the Supreme Court of New Jersey in *Atlantic Northern Airlines Inc. v. Schwimmer*, 12 N.J. 273 (1981) of examining evidence of attendant circumstances in order to determine the intention of the parties to the contract, would have clearly demonstrated that this Room Finish Schedule that applied to other trades, to other painters, to work already covered by the Base and other contractors and also to future work to be awarded at a later date, including the Process Piping and Equipment Package, on a direct basis by Miller Brewing Company, was no more than the master specifications which described what or how work would be done, if part of the scope.

What the missing link is that you cannot give a price to paint described items of work as the sprinklers unless there are sprinkler drawings in existence, which will locate and define or quantify the extent of the scope of work. These hundreds of drawings are a vital part of the contract documents. Without such drawings it cannot be included as part of the scope of work.

a) The thousands of pages of testimony would reveal that drawings for the sprinkler were not in existence when contracts were prepared and could not be included in scope of work; that a very substantial portion of drawings were not in existence, they were out for "100%" review, they were marked "incomplete", "for information only"

or with corrected revisions dates and otherwise reviewable.

b) The testimony was uncontradicted that on the date of the bid, the Room Finish Schedule, which is not the one that appears at App. 4114, had not been received by Gilbane until April 30, 1981, so that they could not have been a part of the bid of Hass, submitted on April 15, 1981 and this item, as the two-thirds of the work of the others referred to, were not in the Room Finish Schedule at the date of the bid.

c) That the exhibit on page A4114 was an exhibit of Gilbane and, as admitted in testimony, was not received by Gilbane until April 30, 1981 (see A3496) which were received by Petitioner after August 17, 1981 (App. 3495, A3497) are some three items of painting in tunnel, which is a section of the Package and Warehouse Building, and the uncontradicted testimony that such work, as well as the last item on that exhibit of painting—exterior masonry walls—was awarded to one or more other painting subcontractors, which could only be determined by the facts elicited in this case, pursuant to the *Atlantic-Schwimmer* case. It is clear proof accepted by jury that these referred to items will become the basis for future changes or individual bids. These facts on their own give rise to strong indicia of an ambiguity, or uncertainty to even allow the introduction of parol evidence and more logically to the conclusion of no meeting of the minds.

d) The items of Process Piping, as well as many of the other listed items, were to be and, in fact, were awarded on a direct award and contract by Miller Brewing to a painting contractor, as part of the Process Piping and Equipment Package, which has to be read to understand the significance of the Room Finish and Color Schedule,

which applied to many packages for painting as well as to other trades of tiling, floor covering, etc. See testimony of William J. Kearny, Vice President of Gilbane (App. 2709, l. 8-17).

e) That not only did Hass perform that work under protest, claiming that it was not part of their scope of work but Gilbane, by its project manager, David A. Ricke (who also did not testify in this case), had written a letter on behalf of Gilbane, which is in direct contradiction of the conclusion of the Court of Appeals stating that they were (through Hass) proceeding to "paint the sprinkler lines in Package and Warehouse under protest and would do no further work on this category". (App. 3529.) It was never discovered that, in fact, Gilbane did not receive payment for this and other items of protest work from Miller in their settlement, by the rule that we could not explore occurrences during settlement negotiations; however, the protest by Gilbane contradicts, or at least, presents an ambiguity to the conclusion of the Court of Appeals.

That there were two comparison charts, which can only be interpreted that it was prepared by and came from the records of Gilbane on discovery, that stated that this work was not part of the scope of work of Gilbane and Miller and, therefore, the jury, with all other facts, concluded that it would not be part of scope from Gilbane to Hass. (A3545.)

f) If, it was so clear that, all the work listed in the Room Finish Schedules as to Packaging and Warehouse, or any of the other buildings, included all these mechanical, electrical HVAC and catwalks, then why did Gilbane immediately, after the preparation dates of originally intended contract and Change Order #1, issue in July, 1981,

a Request for Change Order (R.C.Q. #115) (App. 3476-3482) for the Aging, Fermenting and Cold Service Buildings (that contained the same items of Room Finish and Color Schedule) for painting of piping, miscellaneous, mechanical, electrical, HVAC and catwalks, and continue the consideration of these items and proposals going into December of 1981.

POINT II.

The application of affirmance of disputed contract is contrary to law.

Another clear error by the Court of Appeals is the misapplication of the case of *Merchants Indemnity Corp. v. Eggleston,* 37 N.J. 114, 137 (1962), which it cites as its only authority for its statement that under New Jersey law, parties can elect to affirm an otherwise invalid agreement by their conduct, thus barring either party from later seeking a recision, and in entering the role of fact finding, by saying that the "review of the record," by the Court of Appeals, shows "that Hass through its conduct, elected to affirm change order no. 1."

The case, which has come to be known as the *Eggleston* case is the leading case in New Jersey, as to the body of law applied to the insurance industry, enunciating the general rule, deals with questions of waiver and estoppel, under facts where the insurer asserted a claim of fraud by the insured in connection with the policy and the insurer assumed the defense, without reservation of rights and continued to handle the defense and conduct of the case, to a point that the course could not be rerun and it would be futile "to prove or disprove that the insured would have fared better on his own." There are voluminous cases, that are distinquished by the different fact pat-

terns, since the *Eggleston* case, dealing with requirement of a showing of prejudice, and the proof of reliance, which is not discussed by the Court of Appeals. See *Griggs v. Bertram,* 88 N.J. 347, 358 (1982); *United States Cas. Co. v. Home Insurance Co.,* 79 N.J. Super. 493, 501 (App. Div. 1963). Not only are these cases inapposite to the facts of the case *sub judice,* where there was a reservation of rights, by notice that it was performing the work under protest, and that there was no prejudice to Gilbane, but was proceeding at their urging and promise to adjust the claim, but that it was another incursion by the Court of Appeals, of the right to trial by jury, by its review of the record. See the statements of New Jersey Supreme Court, in a case involving the *Eggleston* insurance issues, which stated that the factual issues, as to waiver, was a jury question, and not to be determined as a matter of law. *Bonnet, et al., v. Stewart,* 68 N.J. 287, 294 and 297 (1975).

Assuming arguendo, the principal of law, as stated by the Court of Appeals, it was in error by treating this case as if the only dispute was the four items of work that was done under protest and that Hass affirmed the Contract by performing this mechanical work. The facts not mentioned by the Court of Appeals show beyond dispute that the work Gilbane wanted Hass to do under its alleged contract was not limited to $144,682.00 claim for extras of work done under protest, which alone would be more than 10% of the combined alleged contracts of $1,040,000.00.

Unrecognized by the Court of Appeals is that the defendant, Gilbane's counterclaim, was that Hass failed to perform work under its contract, without specifying whether it was the Base Contract or Change Order #1, for a total of $508,421.00. There was also testimony offered of greater amounts. (A 3048-3118, 3121-3127, 3131-3201

and exhibits A 4159, A 4189, A4190-4191.) The Hass testimony was that none of this work was included in Petitioner's Estimate, and Mr. Nagin Patel, Hass's Estimator told Gilbane's representive, that anyone in the construction industry would know that it was impossible to do all the mechanical work, as well as architectural and structural, for the price quoted in their proposal and as contained in the putative contract.

When Petitioner left the job on December 15, 1982, it had refused to do any such hundreds of thousands of dollars of work claiming to have completed all work pertaining to architectural and structural steel with the exception of $1,563.00 which, it was agreed, could not be done.

So, it was not the four items that were involved but over six hundred thousand dollars, which was more than half of the combined proposals.

The Court of Appeals stated that Hass sought rescission on the ground no contract had formed between parties.[3] This is not so—the claim is that no contract was formed, so it is unnecessary to rescind. The conclusion that Hass, through its conduct, elected to affirm Change Order No. 1, is totally inaccurate and against the trial contentions of Gilbane. Even the four items of work were not done without reservations but expressly under protest—which is their reservation of rights and beyond that it refused to do any of the mechanical work, either under base contract or under Change Order No. 1. A review of all the testimony will not support an absolute statement that there was no expectation by Gilbane that Hass do mechanical work on the Base Contract—in fact, one item

[3]See *Power-Matics, Inc. v. Ligotti*, 79 N.J. Sup. 294, 306 (App. Div. 1963) *that*, in a case of "*quantum meruit*", the alternative to pleading *recission*, is that is "unnecessary *because* the alleged express contract was actually void, *or did not exist*. (Emphasis added.)

was for mechanical work in Brewhouse which Gilbane stated was part of Hass' scope. A simple question arises is why would Hass write a letter to Gilbane when they submitted the proposal for the original intended contract and in the letter of intent, specifically exclude such work if the language of the agreement forming a part of the contract documents was so clear in not including mechanical work.

To conclude that there was an election to affirm an otherwise invalid agreement by their conduct, baring rescission when only a part of work was done, and this under protest because it was urged to do so by the president of Gilbane, on its promise to work it out and which Gilbane's representative claimed to Miller that it was doing it under protest and would do no more of like work and where it, in fact, refused and did not do any of the other mechanical work on the claim it was not in Hass' scope and it had finished its work, is an exercise of judicial invasion of the authority of the jury and contrary to any proof of an affirmance.

POINT III.

There was no meeting of the minds as found by jury.

The case of *Atlantic Airlines v. Schwimmer* must be read together with the decision of the Supreme Court of New Jersey. *Michael v. Brochchester, Inc.*, 26 N.J. 379, 387 (1958), which said,

> "Ordinarily, the construction of a written contract agreement is a matter for the court, but where its meaning is uncertain *or* ambiguous, and depends upon parol evidence admitted in aid of interpretation, the meaning of the doubtful provisions should be left to the jury".

As stated in *Atlantic v. Schwimmer,* page 301,

> "Evidence of circumstances is always advisable in the interpretation of an integrated agreement. This is so even whether the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety and in quest of the intention, the situation of the parties, the attendant circumstances and the objects they were thereby striving to attain are necessarily to be regarded".

Thus, if from the attendant circumstances there is uncertainty as to the fundamental and essential terms of the intended agreement, it is within the legitimate authority of the jury and not the Court of Appeals, to find on all the facts that there was no meeting of the minds. See *Barco Urban Development Corp. v. Housing Authority of Atlantic City,* 674 F.2d 1001, 1007 (3rd Cir. 1982) for principle that where intrinsic evidence is introduced and interpretation is necessary, it becomes a question of fact for the jury.

Petitioner has never tried to vary or contradict the intent but to establish the intent. The Court of Appeals has not only usurped the functions of the jury but has effectively, by ignoring the law of *Atlantic v. Schwimmer,* eliminated the whole law of Contracts as to "meeting of the minds", under a writing which was intended to form a binding contract. Compare to cases of *Flower City Painting Contractors, Inc. v. Gumina Construction Company,* 591 F.2d 162 (2d Cir. 1979); *Shapiro v. Solomon,* 12 N.J. Super. 377 (App. Div. 1956); *Heim v. Shore,* 56 N.J. Super. 62, 72 (App. Div. 1959); *Sturese v. Pyrene Mfg. Co.,* 9 N.J. 595 (1952).

On the question that the proof as to meeting of minds must deal with the objective intent and not subjective, it is most frustrating to accept a suggestion that there was no expression or manifestation of the intention of Hass. It is difficult to understand that the Honorable John W. Bissell, who presided intently over this case and correctly stated the law as to proof, would have denied the motion for judgment N.O.V. and for a new trial, based on an abundance of manifestations including the contemporaneous requests for change order. There are two items which alone show that there was more than adequate proof of an objective expression that alone are sufficient.

One is that Lou Fulco and Nagin Patel testified that they told Mr. Alan Bernstein, the purchasing agent of Gilbane, that they were bidding only on Architectural and Structural Steel painting in both instances. Mr. Alan Bernstein did not testify so there is no contradiction of this testimony and it was consistent with prior job and as contained in their letter of November, 1980 that no mechanical work would be included. The second item in the testimony of William Kearny, Vice President of Gilbane, who testified that on April 7, 1981 (which is before they bid on what is called Change Order No. 1 and, therefore, had to apply to the originally intended contract), Lou Fulco had been saying that they were not required to do mechanical painting, and Gilbane intended to be included, that he advised the President of Hass that they study the bid documents carefully in making their bid for the separate work. (See Gilbane's main Brief below, page 20.) There was a question of this testimony but, certainly, it is an admission that the intent of Hass was manifest. Nowhere did anyone, on behalf of Gilbane, use the simple words saying that this mechanical work was to be done under this bid, as was done in Change Order from Miller to Gilbane as to other work, and by Gilbane to

Hass for change of office building and other subsequent documents.

POINT IV.

There was no examination made to reconcile jury findings.

The failure to give weight to the fact that both proposals and intended contracts, were signed at the same time and, as testified by Mr. Kearny, were not to be effective until signed on August 18, 1981 after work started, as were other changes to Contract including one which was written in words "Architectural and structural" and fact that the Base Contract referred to drawings that related to plumbing, electrical and other mechanical work and the treatment by defendant of the relationship as an integrated transaction, the Court of Appeals has again deprived Petitioner of its right to trial by jury by failing to recognize the law, as is stated in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 9 L.Ed. 2d 618, 627 (1963) in dealing with a method of construction as to jury's answer to interrogatory, the Supreme Court said it was "the duty of the Courts to harmonize the answers, if it is possible under a fair reading of them and where there is a view of the case that makes the jury's answer to special interrogatories consistent, they must be resolved that way" and "we, therefore, must attempt to reconcile the jury's finding by exegesis, if necessary . . . before we are free to disregard the jury's special verdict and reverse the case for a new trial".

The Court of Appeals made no such thorough attempted evaluation but readily disposed of the issue, contrary to the decision of Judge Bissell and as argued by Pe-

titioner.[4] See also case of *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89 (5th Cir. La.) 1985; *Crossland v. Canteen Corp.*, 711 F.2d 714 (C.A. Tex. 1983; *Smith v. Shell Oil Co.*, 746 F.2d 1087 (C.A. La. 1984); *Machado v. States Marine—Isthmian*, 411 F.2d 584 (C.A. La. 1969); *Julian v. Studley, Inc.*, 407 F.2d 521 (C.A. N.Y. 1969).

Finally, was the Court of Appeals empowered to make new findings or re-examination of the facts under its consideration of the construction of the law or should it have been remanded for a new trial? Petitioner would thus be deprived of a trial by jury for the second time. The Court of Appeals re-examined a portion of the facts, contrary to the applicable cases. See *Mutual Benefit v. Health & Accident Ass'n. v. Brown*, 99 F.2d 856, cert. denied 595 Ct. 485, 306 U.S. 637, 83 L.Ed. 1038 (C.C.A. Neb. 1939); *Griffen v. Matherne*, 471 F.2d 915, rehearing denied, 474 F.2d 1347 (C.A. La. 1973); *Miller v. Royal Netherlands, S.S. Co.*, 508 F.2d 1103 (C.A. La. 1975); *Julian J. Studley, Inc. v. Gulf Oil Corp.*, 407 F.2d 521 (C.A. N.Y. 1969).

Conclusion.

It is most respectfully submitted that the Petitioner has been denied the right to trial by jury by the improper actions of the Court of Appeals and also if there was, in fact, legal error that, at the worst (to Petitioner), the Court should not have re-examined the facts, without even having considered the entire transcript and all the exhibits, but should have sent the case back to the District Court for a new trial. Of course, it is our sincere judg-

[4]See Appendix H attached with portions of findings and decision of Hon. John W. Bissell, taken from our Brief on Appeal.

ment that the decision was fully justified, as within the power and authority of the jury, and should have been sustained.

Respectfully submitted,

GREENBERG MARGOLIS, P.A.
Attorneys for Petitioner
By MILTON M. BREITMAN
Attorney of Record

MILTON M. BREITMAN
Of Counsel and
on the Petition

Dated: December 1989.

APPENDIX A—Order of the United States District Court for the District of New Jersey Denying Respondent's Motion for Judgment N.O.V. and New Trial, Filed March 16, 1988.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

v.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746

This matter having come before the Court pursuant to cross-motions for directed verdict brought by the parties at the close of all of the evidence in this case upon which the Court then reserved decision, motions by the defendant for judgment notwithstanding the verdict, motions by the defendant for a new trial, motions by the defendant for a remittitur, and a motion by the defendant for reduction of the money judgment awarded by the jury; and the Court having read and considered the papers submitted in support of and in opposition to said motions; and the Court having heard and considered the arguments of

counsel; and good cause having been shown for the entry of the within Order,

It is on this 14th day of March, 1988, ORDERED that:

1. Except as set forth in paragraph 2 hereafter, all of the aforesaid motions be and the same hereby are denied; and

2. Defendant's motion for reduction of the money judgment awarded by the jury be and the same hereby is granted to the extent that the award of the jury is reduced by the sum of $31,000.00 in order that the same not include among plaintiff's damages any costs for its workmen travelling from the plaintiff's trailer to the work area of the Miller Brewery construction site which is the subject of this litigation; and

The entry of final judgment herein be and the same hereby is deferred until decision by the Court as to whether there will be any award of prejudgment interest and, if so, its amount, the same to be determined upon forthcoming written submissions by the parties.

JOHN W. BISSELL
United States District Judge

Filed Mar 14 1988
At 8:30 M
William T. Walsh, Clerk

APPENDIX B—Judgment of the United States District Court of New Jersey, Dated May 25, 1988.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

v.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746

For the reasons set forth in the Court's opinion filed herewith,

It is on this 25th day of May, 1988,

ORDERED that judgment is entered, *nunc pro tunc,* as of February 25, 1988, the date of the jury verdict, in the amount of $1,188,621.63 plus $291,908.00 for a total sum of $1,480,529.63; and it is further

ORDERED that the total sum of $1,480,529.63 shall bear Post-Judgment interest from and after February 25, 1988; and it is further

ORDERED that taxable costs are awarded to plaintiff.

JOHN W. BISSELL
United States District Judge

Filed May 27 1988
At 8:30 M
William T. Walsh, Clerk

APPENDIX C—Notice of Appeal to the United States Court of Appeals for the Third Circuit, Dated June 8, 1988.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

vs.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746(JWB)

Notice is hereby given that Gilbane Building Company, defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the

final judgment entered in this action by Judgment dated May 25, 1988.

PECKAR & ABRAMSON, P.C.
70 Grand Avenue
River Edge, New Jersey 07661
Attorneys for Defendant-Appellant
Gilbane Building Company

MARY C. O'CONNELL, ESQ.

Dated: June 8, 1988

Filed Jun 9 1988
At 8:30 M
William T. Walsh, Clerk

APPENDIX D—Notice of Cross-Appeal as to Interest Issue Only, Dated June 21, 1988.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

vs.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746(JWB)

NOTICE IS HEREBY GIVEN that J.I. Hass Co., Inc., plaintiff above named, appeals to the United States Court of Appeals for the Third Circuit from that part of the Final Judgment entered in this action by Judgment dated

May 25, 1988, as to the amount of the allowance of interest fixed by the Court below.

LEVY, SCHLESINGER
& BREITMAN, P.A.
3 ADP Boulevard
Roseland, New Jersey 07068
(201) 992-4400
Attorneys for Plaintiff-Respondent

By MILTON M. BREITMAN

Dated: June 21, 1988

Filed Jun 22 1988
At 10:50 AM
William T. Walsh, Clerk

APPENDIX E—The Written Opinion of the United States Court of Appeals for the Third Circuit, Filed August 8, 1989.

Filed: August 8, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5465 & 88-5523

J.I. HASS CO., INC.

v.

GILBANE BUILDING COMPANY, a corp.
in the State of Rhode Island

GILBANE BUILDING COMPANY,
Appellant in No. 88-5465

J.I. HASS CO., INC.,
Appellant in No. 88-5523

v.

GILBANE BUILDING COMPANY, a corp.
in the State of Rhode Island

On Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Civil Action No. 83-1746)

Argued February 28, 1989

Before: HIGGINBOTHAM, STAPLETON and
COWEN, *Circuit Judges.*

(Filed August 8, 1989)

MILTON M. BREITMAN, ESQ. (ARGUED)
Greenberg, Margolis, Ziegler, Schwartz
Dratch, Fishman, Franzblau & Falkin, P.C.
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Attorney for Appellant-Cross Appellee (Hass)

RICHARD L. ABRAMSON, ESQ. (ARGUED)
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Attorney for Appellee-Cross Appellant (Gilbane)

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

This is both an appeal and a cross-appeal from the judgment of the district court awarding the plaintiff-appellant *quantum meruit* compensation pursuant to a jury verdict. The plaintiff-appellant contends that the district court erred in its determination of the prejudgment interest due under the award. The defendant-cross-appellant appeals from the district court's judgment on the merits of this case, contending that the district court misapplied the law and committed reversible trial errors. Upon our review of the record before us and the legal precepts involved, we find for the cross-appellant. Accordingly, we will reverse the district court's judgment and remand for a new trial.

I.

This action arises out of a contractual dispute between a prime contractor and subcontractor, both

of whom were involved in the construction of a brewery for the Miller Brewing Company ("Miller") in Trenton, Ohio. The Gilbane Building Company of Rhode Island ("Gilbane"), one of Miller's prime contractors, entered into a subcontract with the J.I. Hass Company, Inc. of New Jersey ("Hass"), a painting contractor. This subcontract, dated March 24, 1981, was written and executed by both parties and required Hass to perform painting work in certain buildings in the construction project.[1] The subcontract also contained language, standard in the construction trade, allowing Gilbane to direct Hass to perform extra work through the issuance of change orders that increased the subcontract's scope. Under these change orders, Hass was to receive additional compensation in exchange.

Section 7(b) of the parties' subcontract provided for the performance of extra work and the payment thereof as follows:

> (b) No changes shall be made in the work except upon the written order of the Contractor; the amount to be paid by the Contractor or allowed by the Subcontractor by virtue of said changes to be stated in said orders. In the event of any additions, the amount of compensation to be paid, as so ordered, shall be determined as follows:
>
> (1) By such applicable unit prices as set forth in the contract, or

---

1. Gilbane and Hass had also entered into a lump sum subcontract on March 23, 1981, under which Gilbane agreed to pay Hass $42,870 in consideration for Hass' painting of the Wastewater Treatment Plant. Appendix at 3368. That agreement is undisputed.

> (2) If no such unit prices are set forth, then by a lump sum mutually agreed upon by the Architect, General Contractor and Subcontractor, or
>
> (3) If no such unit prices are set forth, and if the parties cannot agree upon a lump sum, then by the actual net cost in money to the Subcontractor of materials and labor . . . plus compensation of 5% for overhead and 10% for profit.

Appendix ("App.") at 3378.

Pursuant to § 7(b), change order no. 1 was entered on June 1, 1981. Under that change order, Hass agreed to paint more facilities for an additional $753,000. App. at 3466. After Hass had begun performing under change order no. 1, however, a dispute arose between Gilbane and Hass as to whether certain painting of the buildings' "mechanical systems"[2] fell within the change order's scope. Gilbane directed Hass to perform the work that was disputed. Hass subsequently performed some of the work under protest, submitting a claim for compensation pursuant to the extra work provisions of the subcontract. Gilbane adhered, however, to its interpretation of change order no. 1 as providing Hass with full compensation for the extra work, and rejected Hass' claim for additional compensation.

On May 13, 1983, Hass commenced this action against Gilbane in the United States District Court for New Jersey, which had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (1982). Hass not only advanced a claim for compensation for the contested extra work, but also sought, in the first count of its complaint, rescission of the base subcontract on the

---

2. "Mechanical systems" is a collective reference to the heating, ventilating, and air conditioning system, fire protection system, plumbing system, electrical system, and miscellaneous metallic surfaces.

ground that no contract had formed between the parties. The matter proceeded to trial, and was submitted to the jury upon instructions and written interrogatories. The first interrogatory put to the jury asked:

> 1. Has plaintiff proven that there was no contract between plaintiff Hass and defendant Gilbane?

App. at 159.

At the end of the first day of deliberations, the jury submitted the following communication to the district court:

> Re[garding] question number 1. We agree that the base contract existed and we agree that there was no meeting of the minds on change order number 1. Confusion arises as to the wording of question number 1. Based on what we agree on, is the answer yes or no to question number 1?

App. at 3239.

Over Gilbane's objection, the district court responded to the jury's question as follows:

> Considering the evidence and the Court's instructions as a whole and considering all of the work together, you must determine as a whole whether Hass has proven that there was no contract between the plaintiff Hass and the defendant Gilbane.

App. at 3251-52.

Thereafter, the jury returned with a verdict answering the first interrogatory in the affirmative -- i.e., that there was no contract between Hass and Gilbane. Consequently, the jury awarded Hass $1,461,872.63 in *quantum meruit* compensation, the

amount owed on Hass' total cost claim,[3] including a 21% mark-up for overhead and profit. The jury also found that Gilbane was entitled to a credit of $242,251 against Hass for a "fair allowance for any defects or omissions in . . . Hass' performance of the work." App. at 161.

Gilbane subsequently moved for judgment notwithstanding the verdict and, alternatively, for a new trial, remittitur, or reduction in the money judgment. The court denied Gilbane's first three motions but granted a $31,000 reduction in the award of damages. On May 25, 1988, the court entered judgment *nunc pro tunc* against Gilbane in the amount of $1,188,621.63 plus $291,908 in pre-judgment interest for a total sum of $1,480,529.63.

On June 9, 1988, Gilbane filed its notice of appeal as to the final judgment of the district court, and on June 22, 1988, Hass filed its notice of appeal as to the district court's determination of pre-judgment interest due under the award. In addition, we granted leave on January 17, 1989 for the Building Contractors Association of New Jersey ("BCA") to file a brief in this appeal as an *amicus curiae*. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

II.

Gilbane's principal argument on appeal is that there was a valid subcontract between the parties as a matter of law, irrespective of the dispute as to the scope of work under change order no. 1. On that basis, Gilbane contends that the district court erred in denying its motion for a directed verdict dismissing

3. Hass' total cost claim was $2,150,028.63, but the jury subtracted from that amount $688,156 that Gilbane had already paid to Hass. App. at 159.

the first count of Hass' complaint and its motion for a judgment notwithstanding the verdict or, alternatively, for a new trial. Gilbane also contends that the district court erred in denying its motion for a new trial on the basis that the district court, through its supplemental jury instruction, had erroneously rejected the jury's initial determination of the existence of a contract.[4] Gilbane is joined in its contentions by the BCA.

The applicable standards of review are well settled. In reviewing a district court's denial of a directed verdict, "[w]e must determine whether, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief. . . . [I]f the evidence is of such character that reasonable [persons], in the impartial exercise of their judgment may reach different conclusions, the [count] should be submitted to the jury." *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978).

Next, when reviewing a district court's denial of a judgment n.o.v., we are required to review the record in this case in the light most favorable to the non-moving party. We will affirm the district court's denial of the motion "unless the record is 'critically deficient of that minimum quantity of evidence from which the jury might reasonably afford relief.'" *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 921 (3d Cir. 1986)(citation omitted).

Given that the district court's denial of the motion for a new trial was based on its application of a legal precept, our review is plenary. *Honeywell v. American*

4. Gilbane also argues on appeal that the district court abused its discretion in admitting certain evidence and in awarding Hass prejudgment interest. Because we are able to dispose of this case on the basis of Gilbane's principal argument, we need not reach these contentions.

Standards Testing Bureau, 851 F.2d 652, 655 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 795 (1989).

Finally, we review the district court's supplemental jury instruction to determine "whether, viewed in light of the evidence, the charge as a whole fairly and adequately submits the issues in this case to the jury." *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987). We will reverse the district court "'only if the instruction was capable of confusing and thereby misleading the jury.'" *Id.* (citation omitted).

III.

Our first task upon review is to ascertain whether, as a matter of law, a contract existed between Gilbane and Hass, regardless of their dispute as to the scope of work encompassed by change order no. 1. Since this case arises under diversity jurisdiction, we look to the substantive law of New Jersey, where the district court sits, for guidance. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Under the law of New Jersey, the central query in the construction of contracts is the intent of the parties. *Kearny PBA Local 21 v. Town of Kearny*, 81 N.J. 208, 221, 405 A.2d 393, 400 (1979); *Barco Urban Renewal Corp. v. Housing Authority of City of Atlantic City*, 674 F.2d 1001, 1008 (3d Cir. 1982). It is not necessarily the parties' true intent, but the intent as expressed or apparent in the writing, that controls. *Friedman v. Tappan Development Corp.*, 22 N.J. 523, 531, 126 A.2d 646, 650 (1956). Where the contract is clear and unambiguous, the determination of the parties intent is purely a question of law within the exclusive province of the trial court. *Gray v. Joseph J. Brunetti Const. Co.*, 266 F.2d 809, 813-14 (3d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Newark*

Publishers Ass'n v. Newark Typographical Union, 22 N.J. 419, 427, 126 A.2d 348, 353 (1956).

Applying these legal precepts to the facts of this case, we find that Gilbane and Hass had entered a valid base subcontract on March 24, 1981, in which Gilbane had agreed to pay Hass $295,000 in consideration for Hass' painting the architectural and structural surfaces of the Glass Warehouse, Office Building, Powerhouse and Brewhouse facilities in the brewery project. The manifestation of the parties' intent to contract was expressed in the unambiguous language of that contract. Contrary to Hass' assertion that the scope of work under the base subcontract was too vague for there to have been a meeting of the minds on the subject, the subcontract clearly expressed that all painting was to be done "in strict accordance with the [p]lans and [s]pecifications in Rider 'A'" to the subcontract. App. at 3377. Rider A incorporated Section 9F of the second volume of the master specifications, which required painting to be performed in the accordance with the Room Finish Schedules. App. at 3337. These schedules explicitly required the painting of architectural and structural surfaces. App. at 3333, 4107-10. Therefore, we hold that there was a valid base subcontract as a matter of law.

The district court should have entered a directed verdict on the first count of Hass' complaint since the base subcontract clearly existed and no question of fact remained on this issue for jury determination. The district court, however, sent the issue to the jury, which initially found that a base subcontract existed between Hass and Gilbane. The court then compounded its error by not accepting the jury's finding.

Instead of accepting the jury's finding of fact as to the existence of a valid base subcontract, the district court issued supplemental instructions that required the jury to consider the disputed scope of change order no. 1 together with the base subcontract before deciding upon the validity of the subcontract. By doing so, the court erroneously made the "meeting of the minds" standard that is appropriate in determining contract formation conditional upon the parties' having the same understanding of the scope of work under change order no. 1. The New Jersey courts have long stated that the doctrine of mutual assent cannot be misapplied "to impose the requisite that there is no contract unless both parties understood the terms alike, regardless of the expressions they manifested." *Leitner v. Braen*, 51 N.J. Super. 31, 38, 143 A.2d 256, 260 (App. Div. 1958). Since the court's supplemental instructions may have misled the jury into thinking that the existence of a base subcontract was impossible if the parties disputed the scope of work under change order no. 1, we conclude that the district court committed reversible error.[5]

Upon remand, the jury should be instructed only to determine whether Hass performed work that went beyond the scope of change order no. 1 and, if so, what is Hass' appropriate compensation. While the jury initially found that there was no "meeting of the minds" between the parties as to the scope of work under change order no. 1, we find that Hass waived its right to rescind that change order. Under New Jersey law, parties can elect to affirm an otherwise invalid agreement by their conduct, thus barring either party from later seeking rescission. *Merchants*

5. The district court also committed reversible error in not granting Gilbane's motion for a new trial on the basis that a base subcontract existed between the parties as a matter of law.

Indemnity Corp. v. Eggleston, 37 N.J. 114, 137, 179 A.2d 505, 513 (1962). Our review of the record shows that Hass, through its conduct, elected to affirm change order no. 1.

On January 27, 1982, Hass wrote a letter to Gilbane, stating that Hass had been directed by Gilbane's representative to paint the sprinkler pipes in the Packaging and Warehouse Building, and that Hass considered such work to be outside of the scope of change order no. 1. Hass went on to state that it would perform the work under protest and without prejudice to its right to claim additional compensation. App. at 3513. By letter dated August 12, 1982, Hass transmitted four invoices to Gilbane for its painting of the sprinkler pipes and other disputed building mechanical systems, totalling $144,682. App. at 3529. Each of these invoices was based on the actual costs incurred by Hass for labor and materials, plus a 15 percent mark-up for overhead and profit, as prescribed under § 7(b)(3) of the base subcontract. App. at 3530-33.

The above record shows that Hass, instead of rescinding change order no. 1, affirmed its validity by continuing to work under the change order and by seeking additional compensation for the disputed work. Therefore, we hold that Hass' only claim to additional compensation is for any work that Hass performed that exceeded the scope of change order no. 1. Hass contends that its painting of the canopy walkways, platforms and catwalk on the fermenting tank in the Cold Service Area, as well as its painting of ductwork in the Brewhouse and sprinkler pipes in the Packaging and Warehouse Building, is work that exceeded the scope of the change order. Gilbane, in rejoinder, argues that the Room Finish Schedules incorporated in change order no. 1 unambiguously

obligated Hass to paint the building mechanical systems. Therefore, Gilbane asserts that we must find, as a matter of law, that Hass was required to do the work at issue.

Upon our review of the record, we find the Room Finish Schedule for the Cold Service Area clearly required, under the heading of "Specific Surfaces to be Painted," that Hass paint such structural surfaces as platforms, walkways and catwalks on the fermenting tank. App. at 4111. Moreover, we find the Room Finish Schedule for the Packaging and Warehouse Building clearly prescribed, under the subheading of "Process and Building Piping," that Hass "paint exposed noninsulated ferrous metal," app. at 4114, which undoubtedly includes sprinkler pipes. Given the lack of ambiguity with respect to Hass' obligation to paint the platforms, catwalks and walkways on the fermenting tank in the Cold Service Area, as well as the sprinkler pipes in the Packaging and Warehouse Building, we find, as a matter of law, that Hass was obligated to paint these surfaces. Accordingly, Hass is not entitled to any additional compensation with respect to that work.

We find, however, no clear reference in the Room Finish Schedules under change order no. 1 to Hass' painting of ductwork in the Brewhouse. Indeed, the only reference to painting in the Brewhouse is found in the base subcontract. Yet the Room Finish Schedule for the Brewhouse under the base subcontract also makes no clear reference to any painting by Hass of ductwork. Given the ambiguity that exists in the contract as to whether Hass' painting of ductwork in the Brewhouse was within the scope of work under change order no. 1, the jury must decide this issue. *See Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc.*, 31 N.J. 124,

133, 155 A.2d 536, 541 (1959)(while construction of a written contract is ordinarily a matter of law for the court, where its meaning is unclear and may depend on disputed extraneous testimony, submission to the jury may be required).

If the jury finds that Hass, in painting the ductwork in the Brewhouse, performed work exceeding the scope of change order no. 1, then the jury must decide whether the parties intended that such "excess" work be treated as extra work *under* the subcontract or, instead, be treated as work done *outside* the subcontract.[6] If the former, then Hass is to be remunerated under the formula prescribed in § 7(b)(3) of the subcontract. If the latter, then Hass is to be remunerated in *quantum meruit* without reference to the subcontract. In any event, because Hass may have performed work beyond the scope of change order no. 1, a judgment notwithstanding the verdict is not warranted in this case.

IV.

For the foregoing reasons, we will vacate the judgment of the district court, and will remand for a new trial consistent with this opinion.[7]

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6. The intent of the parties in this matter is a question for the jury since there is no clear language in the contract as to how work done in excess of a change order is to be remunerated.

7. Given our decision to vacate the judgment of the district court, we need not reach the contention raised by Hass in its appeal, *viz.*, whether the district court erred in its calculation of pre-judgment interest.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX F—Order of the United States Court of Appeals Denying the Petition for Rehearing and to File Reply to Answer to Petition, Filed October 18, 1989.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 88-5465 & 88-5523

J.I. HASS CO., INC.

v.

GILBANE BUILDING COMPANY, a corp. in the State of Rhode Island

GILBANE BUILDING COMPANY,

Appellant in No, 88-5465

J.I. HASS CO., INC.,

Appellant in No. 88-5523

v.

GILBANE BUILDING COMPANY, a corp. in the State of Rhode Island

(D.C. Civil Action No. 83-1746)

SUR PETITION FOR REHEARING

Present:

Gibbons, *Chief Judge,* Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, and Nygaard, *Circuit Judges.*

The petition for rehearing filed by J.I. Hass, Co., Inc., appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT,

A. LEIN HIGGINBOTHAM
Circuit Judge

Dated: October 18, 1989

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

October 13, 1989

Nos. 88-5465 & 88-5523

Re: HASS vs. GILBANE , etc.

Present:

Higginbotham, *Circuit Judge*

1. Notice of Motion by J. I. Hass Co., Inc. to Allow filing of Reply to Answer to petition for rehearing By Way of A Letter.

2. Affidavit by Gilbane Building Company in Opposition to above motion.

CAROLYN HICKS
Deputy Clerk
Direct Dial 597-3143

ORDER

The foregoing Motion is denied.

By the Court,

A. LEIN HIGGINBOTHAM
Circuit Judge

Dated: Oct 18 1989

APPENDIX G—Order of the United States Court of Appeals Denying Motion of Respondent to Amend Judgment to Include Taxation of Costs, Dated October 31, 1989.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 88-5465 & 88-5523

Re: J.I. Hass, Co., Inc. v. Gilbane, Appellant

Present:

Higginbotham, Stapleton and Cowen, *Circuit Judges*

1. Motion by appellant to amend the judgment to include taxation of costs.

2. For your information, the opinion was filed and judgment entered on August 8, 1989.

3. Letter dated August 24, 1989 received from Milton M. Brietman, Esquire in Response to above motion filed by Gilbane Building Company.

SUSAN ACERBA
Deputy Clerk
Direct Dial 597- 5846

ORDER

The foregoing Motion is denied.

By the Court,

A. LEIN HIGGINBOTHAM
Circuit Judge

Dated: October 31, 1989

APPENDIX H—Portions of Findings and Decision of Hon. John W. Bissell on Denial of Motion for Judgment N.O.V. and New Trial.

On submission of question #1 from the jury, the Court below reviewed the question with the respective counsel in considering whether to refer to the various instruments as separate purported contracts. Hass' counsel argued that the purported agreement had to be considered in its entirety rather than to split the same into separate items. Gilbane's counsel, Ms. O'Connell,[2] stated the following:

> "I'd have to say that it is probably a rare occurrence, but the defendants agree with Mr. Breitman. I don't think it is possible or feasible, given the way this case was presented and the charges originally given to the jury and the relationship between the parties, to split out at this time and try to treat it as if it is two separate contracts". (A3248).

The Court stated, during argument, as follows:

> "I do not accept Ms. O'Connell's statement that they have now determined that there was a Contract and, therefore, that must be accepted as a predicate or basis for future deliberation.
> "On the other hand, I am in basic agreement I think with the position of both of you at this time that the jury should endeavor to resolve this matter viewing it as a whole, viewing the work as a whole". (A3249).

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[2]Ms. O'Connell was appearing on behalf of Gilbane during the absence of Richard L. Abramson, Esq.

As a result of the foregoing, the Court stated, as an answer to the inquiry, that:

> "Considering the evidence in the Court's instructions as a whole and considering all of the work together, you must determine as a whole whether Hass has proven that there was no contract between plaintiff Hass and defendant Gilbane".

The Court, in its determination on the motion for a new trial or for judgment N.O.V. and, in particular, as to the jurors' communication No. 1, stated:

> "The parties were in agreement that it was inappropriate to bifurcate their deliberations with regard to the construction packages in buildings encompassed by the base contract on the one hand and to involving change order number one on the other.
>
> "I remain of the view that it was appropriate to ask them to consider and answer question No. 1 viewing the relationship, the construction packages, the buildings, the work to be done as a whole determining whether or not a contract had truly come into existence".

The Court also stated that "the jury in setting forth its question" were not endeavoring to report a partial verdict.

> "I might add that three additional days of deliberation ensued before the verdict was returned, so I think it is a perfectly appropriate inference that they would, indeed, re-visit the situation at length in analyzing whether a contract came into existence and I do not agree that their result was by any

means predetermined or affected by the court's directing them to resume their deliberation along the lines indicated". (A3303-A3305).